In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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SUBJECT INDEX

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STATE OF OREGON,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner, State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon entered in this proceeding on December 31, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing and remanding Hass's burglary conviction, Appendix C hereto, is reported at 97 Or. Adv. Sh. 200, 13 Or. App. 368, 510 P.2d 852 (1973). The opinion of the Supreme Court of the State of Oregon affirming the decision of the court of appeals, Appendix A hereto, is reported at 98 Or. Adv. Sh. 561, — Or. —, 517 P.2d 671 (1973).

JURISDICTION

The decision of the Supreme Court of the State of Oregon, Appendix A hereto, was filed on December 31, 1973, and this petition for a writ of certiorari was filed within 90 days of that date, pursuant to Rule 22 (1). This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Notwithstanding this Court's decision in *Harris v. New York*, 401 U.S. 222 (1971), does the Fifth Amendment, as applicable to the States through the Fourteenth Amendment, prohibit the use by the prosecution, for impeachment purposes, of statements made by a criminal defendant after the accused has been fully advised of his constitutional rights in accordance with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), and has expressed a desire to talk to an attorney?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. General Background

Hass was convicted upon trial by jury of a burglary in the first degree (Oregon Revised Statutes 164.225), which involved the stealing of a bicycle from the garage of a residence in Klamath Falls, Oregon. He appealed his conviction to the Oregon court of appeals, which decided three of the four issues raised adversely to Hass, but reversed the judgment on the ground that certain statements Hass made to a police officer were improperly used to impeach his trial testimony (See Appendix C hereto). Upon the State's petition for review, the Oregon supreme court affirmed the decision of the court of appeals in a 4-3 decision (See Appendix A hereto).

B. Facts Material to the Question Presented

On the day of the burglary, officer Osterholme of the Oregon State Police talked to Hass about the theft of the bicycle taken therein, after advising him of his *Miranda* rights (Tr. 45-46, 50-51). Hass admitted that he had taken two bicycles that day, and was not sure, at first, which bicycle Osterholme was talking about (Tr. 52). He stated that he had given one of the two bicycles back and agreed to show Osterholme where he had concealed the other (Tr. 53-54).

At some point on the trip to the spot where the second bicycle was concealed, Hass indicated that he realized he was in trouble and asked Osterholme if he could contact an attorney. Osterholme replied that Hass could telephone an attorney as soon as the two of them reached

the police station. In response to Hass's specific question, he also indicated that Hass did not have to continue to assist him in the investigation of this matter, but that he would like to "clear up" the matter at that time (Tr. 62-63). After Osterholme recovered the second bicycle, Hass pointed out to him the homes from which the two bicycles had been taken (Tr. 67-68).

Upon hearing testimony concerning these events *in camera*, the trial court ruled that the things Hass did and said prior to the time he inquired about the availability of counsel were admissible in the State's case-in-chief, but that Hass's inquiry constituted a request for counsel and that anything he did or said thereafter was inadmissible (Tr. 70). Accordingly, Osterholme testified in the State's case-in-chief only that Hass had admitted that he and Patrick Lee had taken two bicycles on the day in question because he had needed money, that he had given one bicycle back, and that the second bicycle was also subsequently recovered (Tr. 72-73).

Hass then testified in his own behalf that he, Pat Lee, and Bill Walker had been driving around the area where the bicycles were taken, that Lee and Walker had taken the bicycles without his prior knowledge, that he did not know the exact location of the residences from which the bicycles had been taken, and that he knew only that the bicycles "came out of the area—you know, where I left

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① On trial, Hass controverted officer Osterholme's testimony concerning the exact content of this conversation (See Tr. 66), but it is clear that the Oregon trial and appellate courts generally accepted Osterholme's testimony, as summarized above.

Pat and Bill off" (Tr. 95-96, 99, 109). In short, he admitted taking part in the subsequent concealment of the bicycles, and thus admitted his guilt of the crime of theft by receiving, but claimed that he had had no part in the burglary of which he was charged.

In rebuttal, the State recalled officer Osterholme, who testified, over Hass's objection, that after he had obtained the admissions about which he had previously testified, he had taken Hass to the area where the two bicycles had been stolen, and that Hass had pointed out the houses from which they had been taken (Tr. 111-112). The court then instructed the jury that this testimony was received only for purposes of impeachment (Tr. 125-126). On surrebuttal, Hass denied that he had pointed out the residences in question (Tr. 126-127).

C. Manner in Which the Federal Question Was Raised

The Federal question presented herein was originally raised by Hass, by his timely objection in the trial court to the admission of any statements which he made to officer Osterholme after he had expressed a desire to talk to an attorney.

> "[Defense counsel]: To save time I would agree that up to the point of Mr. Hass telling him that he wanted an attorney and that he was in a lot of trouble, that statement would be admissible but after that point I believe that all of the evidence incriminating this Defendant was illegally obtained and completely inadmissible." (Tr. 62).

The trial court initially ruled that such statements were obtained in violation of Hass's rights under *Miranda*

v. Arizona, 384 U.S. 436 (1966), and therefore inadmissible.

> "[THE COURT]: The Court sustains the objection to any of the admissions or statements of the Defendant from and after the time when he first stated that he wanted to see an attorney and the Court sustains the objection to the identification by the Defendant of the locations where the bicycle [*sic*] was taken unless the fact situation is other than you have indicated. . . ." (Tr. 70).

However, after Hass testified in a manner inconsistent with the statements previously excluded, the trial court ruled that, despite defendant's objection, the statements previously excluded were admissible for impeachment purposes, under *Harris v. New York*, 401 U.S. 222 (1971).

> "[The prosecutor]: Your Honor, on the State's case in chief, the State was not allowed to introduce evidence by Officer Osterholme that the Defendant had taken him to two residences where the bicycles were taken from and we would propose in our rebuttal case in view of the Defendant's testimony in Defendant's case that he didn't have knowledge of the two homes, we would propose to introduce evidence to the effect that he did take Officer Osterholme to these residences and I would site [*sic*] to the Court [*Harris v. New York*].
>
> * * *
>
> "[THE COURT]: The objection to the proposed rebuttal is over ruled but the Court is going to give the Jury the usual instruction that they can receive that evidence not as evidence—substitutive [*sic*] evidence but only bearing on the credibility of the Defendant as a witness. . . ." (Tr. 110).

On Hass's appeal to the Oregon court of appeals, this

ruling of the trial court was assigned as error in Hass's brief, as follows:

> "The trial court erred in allowing the state to use for impeachment purposes a statement elicited from the defendant by police interrogation which was inadmissible as part of the prosecution's case in chief because of failure to comply with constitutional requirements. . . ." (Appellant's Brief, at 19).

In its decision reversing Hass's conviction, the court of appeals indicated a belief that the evidence in question may have been admissible for impeachment purposes under *Harris v. New York, supra,* but held that it was bound by the contrary decision of the Oregon supreme court in *State v. Brewton,* 247 Or. 241, 422 P.2d 581, cert. denied 387 U.S. 943 (1967).[2] See Appendix C hereto.

The State sought rehearing in the court of appeals and discretionary review by the Oregon supreme court, on the grounds that in view of *Harris v. New York, State v. Brewton* was no longer a correct statement of the applicable rule of Federal constitutional law. The petition for rehearing read, in relevant part:

> ". . . [T]he Court erred in holding, at page 6 of its slip opinion, that *State v. Brewton* . . . is, and should remain the law of Oregon, notwithstanding the subsequent, contrary decision of the Supreme Court of the United States on precisely the same question of Federal constitutional law in *Harris v. New York,* . . . and that therefore, in-custody statements of a criminal defendant which are voluntary but for noncompliance with the requirements of *Miranda v. Arizona,* may not be used to impeach the defendant's

[2] For the convenience of the Court, this decision is reprinted as Appendix D hereto.

testimony in an Oregon criminal case, even though their use for that limited purpose is sanctioned by the Supreme Court of the United States." (Petition for Rehearing, at 1).

The point urged in the petition for review filed in the Oregon supreme court was stated as follows:

> "(a) The Court of Appeals erred in holding, at page 6 of its slip opinion, that *State v. Brewton* . . . is, and should remain the law of Oregon, notwithstanding the subsequent, contrary decision of the Supreme Court of the United States on precisely the same question of Federal constitutional law in *Harris v. New York* . . . . Or, in other words:
>
> "(b) The Court of Appeals erred in holding that in-custody statements of a criminal defendant which are voluntary but for non-compliance with the requirements of *Miranda v. Arizona* . . . may not be used to impeach the defendant's testimony in an Oregon criminal case, even though their use for that limited purpose is sanctioned by the Supreme Court of the United States." (Petition for Review, at 1-2).

In its 4-3 decision affirming the decision of the court of appeals, the Oregon supreme court distinguished the present case from both *Brewton* and *Harris*, and held that when full *Miranda* warnings are given, *Harris v. New York* is not applicable; and statements obtained without fully complying with the requirements of *Miranda* still may not be used, even for impeachment purposes. See Appendix A hereto.

The Federal question presented herein has thus been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

A. The Oregon supreme court has decided an important question of Federal constitutional law in a manner in conflict with the applicable decisions of this Court.

In *Harris v. New York*, 401 U.S. 222 (1971), this Court held that statements of a criminal defendant which would be admissible in the prosecution's case-in-chief, but for failure of the police to comply with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used to impeach the testimony of a criminal defendant who takes the stand and testifies in a manner contrary to his prior statements. This Court had previously held that a similar rule applies to the use, for impeachment purposes, of evidence seized in violation of the Fourth Amendment. *Walder v. United States*, 347 U.S. 62 (1954).

In failing to hold *Harris* controlling in the present case, the Oregon supreme court has drawn an artificial and meaningless distinction between one form of technical noncompliance with *Miranda* and another. Whether the police are to be faulted for failing to fully advise a suspect of his constitutional rights before questioning him, or whether they are to be faulted for continuing to question him after he expresses a desire to talk to counsel, the prophylactic purpose of the *Miranda* rule is adequately served by holding the evidence thus obtained inadmissible in the prosecution's case-in-chief. To go further, and to hold that evidence unusable for impeachment purposes as well, is to pervert the shield provided by *Miranda* into a license to use perjury by way of a defense, which is

precisely what *Harris* said is to be avoided. 401 U.S. at 226.

B. The Oregon supreme court has decided an important question of Federal constitutional law in a manner contrary to that of other courts, State and Federal.

As the dissenting opinion herein points out, the Supreme Court of North Carolina has held admissible, for impeachment purposes, statements which were obtained under essentially the same circumstances as are presented here. *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111 (1972). And at least two lower Federal courts have reached a similar result in pre-*Miranda* cases, with respect to statements obtained in violation of the requirements of *Escobedo v. Illinois*, 378 U.S. 478 (1964). *United States ex rel. Wright v. La Vallee*, 471 F.2d 123 (2d Cir. 1972); *United States ex rel. Padgett v. Russell*, 332 F. Supp. 41 (E.D. Pa. 1971). The conflict between these decisions and the decision herein merits resolution by this Court.

CONCLUSION

Whatever the future of the exclusionary rule may be with respect to the use of evidence in the prosecution's case-in-chief,[3] the Oregon supreme court's decision herein with respect to evidence used solely for the purpose of impeachment needlessly and improperly prevents Oregon prosecutors from using evidence for that purpose which is constitutionally permissible. Accordingly,

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[3] We note in passing this Court's grant of certiorari in *Michigan v. Tucker*, — U.S. —, 94 S. Ct. 568 (No. 73-482, December 3, 1973), in which the continuing viability of *Miranda* is at least questioned.

and for the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Oregon herein.

Respectfully submitted,

LEE JOHNSON
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W. MICHAEL GILLETTE
Solicitor General

THOMAS H. DENNEY
Assistant Attorney General
Counsel for Petitioner

March 1974

APPENDIX A

OPINION OF OREGON SUPREME COURT

No. 10,270—December 31, 1973

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

STATE OF OREGON, *Petitioner*, *v.* WILLIAM ROBERT HAAS, whose true name is WILLIAM ROBERT HASS, *Respondent*.

On Review from the Court of Appeals.

Argued and submitted October 15, 1973.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for petitioner. With him on the briefs were Lee Johnson, Attorney General, and John W. Osburn, Solicitor General, Salem.

Sam A. McKeen, Klamath Falls, argued the cause and filed a brief for respondent.

Affirmed.

HOLMAN, J.

The defendant was convicted pursuant to a jury trial of the crime of first degree burglary. The Court of Appeals reversed and remanded for a new trial[1] because the trial court allowed information obtained by the police in violation of *Miranda v. Arizona*[2] to be used to impeach defendant's testimony. This court granted review for the sole purpose of determining whether information secured

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[1] 97 Adv Sh 200, — Or App —, 510 P2d 852 (1973).

[2] 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 ALR 3d 974 (1966).

in violation of *Miranda* rules can be used for impeachment purposes under the circumstances which existed in this case.

Two bicycles were stolen from houses in the Moyina Heights district of Klamath Falls. One was taken from the Lehman residence and one was taken from the Jackson residence. Defendant was indicted for the burglary of the Lehman residence.

In an *in camera* hearing the arresting officer testified that after he gave the *Miranda* warnings, he questioned defendant about the Lehman theft and the defendant responded that two bicycles had been stolen and he did not know theft the officer was talking about. The officer then requested defendant to accompany him on a further investigation to clear up the matter and defendant agreed. However, on the way to the site of the thefts defendant had some misgivings and indicated he wanted to talk to a lawyer. The arresting officer responded that he could see a lawyer when they got back and proceeded with the investigation, during which defendant pointed out the two houses from which the bicycles had been taken. Pursuant to the disclosures made at the *in camera* hearing, the trial judge ruled that all references to defendant's activities after his request for a lawyer were barred from introduction in evidence.

Thereafter, defendant took the stand and testified that he had participated in concealing the bicycles when he knew they had been stolen, but he denied having known that they were going to be stolen and the houses from which they were taken. On rebuttal, over objection,

the arresting officer was permitted to testify for impeachment purposes that defendant had directed him to both the Lehman and Jackson houses and had identified them as being the ones from which bicycles had been taken.

The question of the use, for impeachment purposes, of information secured in violation of rules similar to those of *Miranda* was presented to this court in the case of *State v. Brewton.*[5] In that decision, in which the court was divided four to three, we held that information secured in violation of the rules set forth in *Escobedo v. Illinois,*[6] *Miranda's* precursor, could not be used for impeachment purposes. Since this court's decision in *Brewton*, the Supreme Court of the United States, in *Harris v. New York,*[7] has faced a similar problem in relation to *Miranda* rules and has reached a decision contrary to *Brewton* based upon reasoning similar to the dissenting opinions in *Brewton*. The rationale of the *Harris* opinion was that while information secured in violation of the *Miranda* rules may not be used to incriminate a defendant, neither should such violation be used as a shield for or an invitation to perjury; and, assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.[8]

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[5] 247 Or 241, 422 P2d 581, *cert. denied*, 387 US 943, 87 S Ct 2074, 18 L Ed 2d 1328 (1967).

[6] 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964).

[7] 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971).

[8] *Id.* at 225-26.

It was for the purpose of deciding whether we wished to overrule *Brewton* that we took review of this case. However, we now find that it is not necessary to make that determination in deciding this case because whether the reasoning of *Brewton* or of *Harris* is used, the opinion of the Court of Appeals must be affirmed and the defendant's conviction reversed.

In *Brewton* and *Harris* either insufficient or no warnings were given. In those situations, before questioning begins, the police do not know whether or not they will get incriminating information from the defendant if they give the required warnings. Experience has taught there is a good possibility they will.[7] Therefore, the argument can be made that in such situations it appears likely that police will not take the chance of losing incriminating evidence for their case in chief by not goving adequate warnngs. The change of being able, without sufficient warnings, to use what information they get for impeachment affords insufficient advantage to induce the police to endanger their chance of making a case at all. Therefore, in such circumstances the prophylactic measure of total exclusion may not be necessary because police will not be induced by the more limited use to fail to give the proper warnings.

However, such is not this case. The defendant here was given proper warnings and took them at their word and asked for a lawyer.[8] The police then knew they

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[7] E. Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv L Rev 42 (1968).

[8] The opinion in *Harris* makes no mention of any request by Harris for a lawyer, and the opinion is interpreted as if there was none. However, see comment, 80 Yale L J 1198, 1200 (1971), which indicates that he may have asked to see a lawyer but he would be satisfied to see one "tomorrow."

would most likely get nothing further from defendant if he consulted a lawyer. Therefore, they had nothing to lose and something to gain by violating *Miranda* if the State is permitted to use such information as was secured by continued interrogation for impeachment purposes. In such a situation, there is no pressure whatsoever to obtain compliance and the prophylactic exclusion of the evidence as dictated by *Miranda*, *Escobedo*, and *Neely*[@] is still required.[#]

The opinion of the Court of Appeals is affirmed.

HOWELL, J., dissenting.

I dissent. I do not see any difference between the situation in this case and one where the police secure information given voluntarily to them but without a prior *Miranda* warning. In my opinion, the court is presented with a choice between the prophylactic effect of punishing impermissible police conduct by prohibiting the admission of any evidence whether substantive or impeachment, or a license to the defendant to commit perjury. The choice made by the United States Supreme Court was aptly expressed by Mr. Chief Justice Burger in *Harris v. New York*, 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971):

> "* * * The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the

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[@] State v. Neely, 239 Or 487, 395 P2d 557, 398 P2d 482 (1965).

[#] *See* United States ex rel Wright v. LaVallee, 471 F2d 123 (2d Cir 1972), for a contrary result though the rationale applied by us in the present opinion was not discussed.

speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. * * *

"The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. * * *" 401 US at 225, 226.

No *Miranda* warning was given in *Harris*. In the instant case, the warning was given, but apparently the interrogation continued after the defendant stated that he wanted to see a lawyer. The result should be the same as in *Harris:* the state is precluded from offering that evidence as part of its case in chief, and the defendant is precluded from using the *Miranda* shield to commit perjury.

In *United States ex rel. Wright v. LaVallee*, 471 F2d 123 (2nd Cir 1972), the defendant contended that a statement elicited by a police officer after defendant had requested and been denied counsel was inadmissible as a violation of *Escobedo v. Illinois*, 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964). The court held that as the statement was used only on cross examination for impeachment purposes it was admissible under the *Harris* decision.

In *United States ex rel. Padgett v. Russell*, 332 F Supp 41 (DC ED Pa 1971), the court held that even if the in-

terrogation of the defendant violated *Escobedo* standards for being obtained in the absence of counsel, the admission of the evidence for impeachment purposes did not violate constitutional standards. The court stated:

> "* * * [A]ssuming that the interrogation was conducted under circumstances violative of *Escobedo*, Harris v. New York, * * * is clearly dispositive of petitioner's claim. *Harris* limited *Miranda*, and by necessary implication *Escobedo*, in holding that a statement obtained through improper custodial interrogation could be introduced to impeach the credibility of the defendant, though not to establish the prosecution's case in chief. * * *"

The same result was reached by the Supreme Court of North Carolina in *State v. Bryant*, 280 NC 551, 187 SE2d 111 (1972), where the defendant had been given the *Miranda* warning, but had not waived his right to counsel. The court found that *Harris v. New York*, supra, permitted the statements to be used for impeachment purposes.

I would overrule our decision in *State v. Brewton*, 247 Or 241, 422 P2d 581 (1967), and reverse.

Tongue, J., and Bryson, J., join in this dissent.

APPENDIX B

JUDGMENT OF OREGON SUPREME COURT

STATE OF OREGON

SUPREME COURT

Mandate

STATE OF OREGON,	)	
	)	Appeal from
Petitioner	)	KLAMATH
v.	)	County
	)	No. 72 124 C
WILLIAM ROBERT HAAS, whose true name is William Robert Hass,	)	
	)	On Review
	)	from Court
Respondent	)	of Appeals

This cause on October 15, 1973, having been duly argued and submitted upon questions arising on petition for review from the Court of Appeals, and the court having fully considered said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS ORDERED and ADJUDGED that the decision of the Court of Appeals is affirmed.

IT FURTHER IS ORDERED that respondent recover from petitioner his costs and disbursements in this court taxed at $15.00.

IT FURTHER IS ORDERED that this cause is remanded to the Court of Appeals for entry of order in accordance herewith.

ENTERED at Salem, Oregon this 31st day of December, 1973.

APPENDIX C

OPINION OF COURT OF APPEALS

No. 1676—May 21, 1973

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, *Respondent*, *v.* WILLIAM ROBERT HAAS, whose true name is WILLIAM ROBERT HASS (No. 72-124-C), *Appellant*.

Appeal from Circuit Court, Klamath County.

Donald A. W. Piper, Judge.

Argued and submitted May 7, 1973.

Sam A. McKeen, Klamath Falls, argued the cause and filed the brief for appellant.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and John W. Osburn, Solicitor General, Salem.

Before Schwab, Chief Judge, and Langtry and Thornton, Judges.

Reversed and remanded.

LANGTRY, J.

Defendant was convicted by a jury of first degree burglary (ORS 164.225) and appeals the resulting sentence of $250 fine and two years' probation. Evidence was that two bicycles had been stolen, one from the garage of the Lehman house and one from the garage of

the Jackson house in the same area (Moyina Heights) of Klamath Falls in August 1972. Defendant was indicted for the burglary from the Lehman residence. He was not charged with the other burglary.

Mr. Lehman and his son testified that they had witnessed someone riding the bicycle out of their driveway and gave chase to a vehicle from which they eventually recovered the bicycle. They identified the defendant as the driver of the vehicle, and his only companion as the person who had taken the bicycle.

In camera, Officer Osterholme testified that after *Miranda* warnings,[1] he had questioned defendant about the Lehman theft. Defendant in substance replied that he had stolen two bicycles that afternoon and did not know which theft the officer was talking about. Defendant then showed him where the second bicycle was concealed and pointed out the two houses from which the bicycles were taken. Prior to locating the second bicycle but after his initial statement to the officer, defendant had asked if he could phone his lawyer. The court, on motion of the defendant, ruled that all reference to defendant's activities after his request for a lawyer would not be admitted for failure to comply with the *Miranda* rules.

Officer Osterholme then testified to the jury as to the statement made by defendant that he had stolen two bicycles that day. He also testified that he had recovered a bicycle and had taken it to a Mr. White who identified it as belonging to his son, Roy. Two members of the

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[1] Miranda v. Arizona, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974 (1966).

Jackson family testified that a bicycle belonging to Roy White had been kept in their garage. Mr. Jackson testified he was unaware the bicycle had been stolen until a state police officer had brought it to his house to be identified.

Defendant took the stand and testified that he had had no prior knowledge of the burglaries, which had actually been committed by two other people who were riding around with him in his vehicle. But he said he had participated in the attempt to conceal the bicycles from their owners. He denied knowing from which houses the bicycles had been taken.

On rebuttal Officer Osterholme was permitted to testify for impeachment purposes only that defendant had taken him to and had identified the two houses.

Defendant's assignments of error raise four issues. (1). Is an attached garage part of a dwelling so that burglary from a garage would be first degree burglary? (2). Must an indictment for burglary state the crime intended to be committed inside of the entered building? (3). Was the evidence of the second burglary admissible? (4). May evidence obtained in violation of the *Miranda* rules be admitted for the limited purpose of impeaching the credibility of a witness?

(1). Defendant bases his argument that an attached garage is not a dwelling on the contention that the 1971 legislature redefined "dwelling" and defined "building" for the first time in such a manner that such a garage would no longer be included as a dwelling.[2]

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[2] Former ORS 164.210 (2) (repealed 1971) provided:
" 'Dwelling house' includes any building of which any part has

(Continued on page 23)

We do not reach this question of statutory construction because the record shows that this garage was neither a separate structure nor a separate unit. The garage was under the same roof as the rest of the dwelling and was surrounded on three sides by rooms occupied by the family. As such it was structurally no different than any other room in the house. *Cf. State v. Burns*, 94 Adv Sh 1124, 9 Or App 392, 495 P2d 1240 (1972).

(2). Defendant demurred to the indictment during the course of the trial on the ground that the indictment failed to state a crime.[2]

The general rule is that an indictment in the language of the statute creating the offense is sufficient as long as it alleges all of the elements of the crime that must be proven for conviction. *State v. Smith*, 182 Or 497, 188 P2d 998 (1948); *State v. Jim/White*, 96 Adv Sh 1583, — Or App —, 508 P2d 462 (1973).

(Continued from page 22)

usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such building."

ORS 164.205 (1) and (2) now read:

"(1) 'Building,' in addition to its ordinary meaning, includes any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, including, but not limited to, separate apartments, offices or rented rooms, each unit is, in addition to being a part of such building, a separate building.

"(2) 'Dwelling' means a building which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present."

[2] We consider this demurrer to be based on ORS 135.630 (4) which provides for a demurrer on the ground "[t]he facts stated do not constitute a crime * * *."

We do not consider here what the proper ruling would have been had a demurrer based on ORS 135.630 (2) been made at the proper time, such a demurrer being equivalent to a motion to make more definite and certain.

The indictment in this case is in the language of the statute[1] and is therefore sufficient to state the crime charge. *State v. Jim/White*, supra, 96 Adv Sh at 1599.

(3). Was evidence of the second burglary admissible? The general rule is that evidence of the commission of other crimes by the defendant is inadmissible. *State v. Lehmann*, 6 Or App 600, 488 P2d 1383 (1971); *State v. Woolard*, 2 Or App 446, 467 P2d 652, Sup Ct *review denied* (1970), *cert denied* 406 US 972 (1972). But such evidence is admissible where it shows "'"* * * a common scheme or plan embracing the commission of two or more crimes, so related to each other that the proof of one tends to establish the others * * *."'" *State v. Woolard*, supra, at 449. The test is whether the relevance of the evidence outweighs its prejudicial effect. *State v. Spunaugle*, 96 Adv Sh 245, 249, — Or App —, 504 P2d 756 (1972); *State v. Lehmann*, supra. Defendant contends that the second burglary was never connected to the defendant in the state's case-in-chief. Therefore the relevance of the evidence to the crime charged was never shown and thus there was nothing to outweigh the prejudicial effect.

While the state was not permitted to show a direct link between the defendant and the second crime, because the evidence of defendant's locating the second bicycle was excluded and because the Jacksons could not state with certainty that the bicycle had been stolen

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[1] ORS 164.215 (1) provides:

"A person commits the crime of burglary * * * if he enters or remains unlawfully in a building with intent to commit *a crime* therein." (Emphasis supplied.)

on the same day that a bicycle was taken from the Lehman residence, we feel that the evidence was sufficiently relevant to permit its introduction. This is so because the state did show that the defendant had volunteered that he was involved in two bicycle thefts inthe same area. The evidence showed the burglary at the Jackson residence had definitely occurred within a few days of the crime charged and quite possibly on the same day. The state need not prove beyond a reasonable doubt that defendant committed the second crime in order for evidence thereof to be admitted. *Cf. State v. Johnson*, 96 Adv Sh 1318, — Or App —, 507 P2d 828 (1973).

(4). This question stems from the allowance by the trial judge of the admission of evidence obtained from defendant in violation of the *Miranda* rules for the limited purpose of impeaching defendant's credibility. In *Harris v. New York*, 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971), the court held such evidence if otherwise "trustworthy" was admissible for the limited purpose of impeaching the credibility of a defendant who took the stand. In *State v. Brewton*, 247 Or 241, 422 P2d 581, *cert denied* 387 US 943 (1967), the Oregon Supreme Court held such evidence was not admissible for impeachment purposes. We are bound by the decision of our own Supreme Court in this area. *State v. Evans*, 2 Or App 441, 468 P2d 657 (1970), *reversed* 258 Or 437, 483 P2d 1300 (1971).

Reversed and remanded.

APPENDIX D

OPINION IN STATE v. BREWTON, 247 OR. 241, 422 P.2d 581 (1967)

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, *Respondent*, *v.* FRANK LEROY BREWTON, *Appellant*.

* * *

In Banc

Appeal from Circuit Court, Multnomah County.

J. J. Murchison, Judge.

William J. Sundstrom, Portland, argued the cause and filed a brief for appellant, and appellant filed briefs in propria persona.

Jacob B. Tanzer, Deputy District Attorney, Portland, argued the cause for respondent. With him on the brief was George Van Hoomissen, District Attorney, Portland.

Hardy Myers, Jr., Portland, filed a brief as amicus curiae on behalf of the American Civil Liberties Union of Oregon.

Before McAllister, Chief Justice, and Perry, Sloan, O'Connell, Goodwin, Denecke and Holman, Justices.

Reversed and remanded.

GOODWIN, J.

This is an appeal from a conviction of first-degree murder. Background facts beyond those essential for this appeal are substantially outlined in *State v. Brewton*, 220 Or 266, 344 P2d 744 (1959), and in 238 Or 590, 395 P2d 874 (1964).

The only issue here is whether it was error to permit

the state to impeach the defendant with statements that were elicited from him by police interrogation which, the state concedes, rendered the statements inadmissible as a part of its case in chief. The interrogation, which took place in November 1957, was not preceded by the warnings and advice concerning Fifth and Sixth Amendment protection that are now required by *State v. Neely*, 239 Or 487, 503-504, 395 P2d 557, 398 P2d 482, 486-487 (1965), and by subsequent decisions of this court.

After the state had rested without offering Brewton's admissions in evidence, Brewton took the stand in his own defense. He told a story which, if believed, might have been consistent with his theory that he was not a principal in the crime. Brewton's courtroom story, however, was wholly inconsistent with the statements he had given the police shortly after his arrest.

After hearing the defendant's testimony, the state offered his police-station admissions for the limited purposes of impeachment, and they were so received over a timely objection. (The trial court earlier had held a hearing upon the issue of voluntariness, and had found as a fact that the admissions which Brewton made to the police were voluntary, at least in the sense that they were not coerced in any manner. The statements fell under the exclusionary rule only because they did not meet the constitutional requirements of *State v. Neely*.)

A number of state and federal decisions tend to support the trial court in receiving such evidence for impeachment. *Tate v. United States*, 283 F2d 377 (DC Cir 1960), deals with the conflict between the *McNabb-*

Mallory exclusionary rule and a desire for truth provable by trustworthy evidence. The case holds that when one set of these interests must yield it is better that the exclusionary rule yield than to stand upon that rule and invite perjury. See also *State v. McClung*, 66 Wash2d 654, 404 P2d 460 (1965), cert. denied, 384 US 1013, 86 S Ct 1967, 16 L Ed 2d 1031 (1966). It might be noted that the federal procedural rationale for the *McNabb-Mallory* rule has recently been replaced by constitutional rules now binding on the states. *Escobedo v. Illinois*, 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964).

This court has not been faced with the identical question decided in *Tate v. United States*, but *State v. Smith*, 242 Or 223, 408 P2d 942 (1965), is instructive. In *State v. Smith*, we held that a confession not shown to be voluntary was just as untrustworthy when used to prove the defendant a liar as when used to prove that he committed the crime for which he was on trial. It has been pointed out in the case at bar that Brewton's admissions to the police were voluntary ,at least in the pre-*Escobedo* sense that they were not obtained by threats or promises.

While an argument can be made that "voluntary" unconstitutional confessions can be distinguished from "involuntary" unconstitutional confessions, solely for the purposes of impeachment, this dichotomy does not appeal to us as constitutionally meaningful.

Since the decision in *State v. Neely*, supra, this court has consistently applied the exclusionary rule when the facts established interrogation which was held to violate the constitutional rights of the defendant as interpreted

in *State v. Neely*. See, e.g., *State v. Ervin*, 241 Or 475, 406 P2d 901 (1965); *State v. Keller*, 240 Or 442, 402 P2d 521 (1965). In these cases we have recognized the inherently coercive chcaracter of police interrogation of a suspect in custody who has not been advised of his rights. Even in cases in which we have affirmed convictions following custodial interrogation, we have done so only upon express findings supported by credible evidence that there was an intelligent waiver of rights. See, e.g., *State v. Atherton*, 242 Or 621, 410 P2d 208, cert. denied 384 US 1025, 86 S Ct 1982, 16 L Ed 2d 1030 (1966).

Whether or not *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 714 (1966) is binding upon Oregon courts with reference to trials concluded before the *Miranda* decision was published, we are satisfied that any attempt in the future to restrict the exclusionary rule to the state's case in chief would be inconsistent with the constitutional principles which are inherent in the *Miranda* case as well as in our own earlier decision in *Neely*.

The United States Supreme Court under the Fourteenth Amendment has attempted to achieve uniformity between the state and federal systems in the interpretation of Fourth, Fifth and Sixth Amendment rights. It has done so upon the assumption that the exclusionary rule is a necessary procedural device to implement the substantive rights written into the Fourth, Fifth, and Sixth Amendments. This court, accordingly, has adopted the assumption that without the procedural aid of the exclusionary rule those substantive rights would

be empty promises instead of constitutional guarantees. We so held in *State v. Neely*, and we have followed that view in cases coming before us since *Neely*.

If we should today adopt a restrictive application of the exclusionary rule, the result could be a major step backward. This court would in effect be saying to the overzealous that police officers will be free in the future to interrogate suspects secretly, at arms length, without counsel, and without advice, so long as they use means consistent with threat-or-promise voluntariness, and so long as they understand that they may file the information only for use to keep the defendant honest. Thus the police could, at their option, take a calculated risk: By giving up the possibility of using the suspect's statements in the state's case, they could obtain by unconstitutional means and store away evidence to use if the defendant should elect upon trial to take the stand. As commendable as it may be to prevent perjury, the price of such prevention could be to keep defendants off the stand entirely. In some cases, the temptation to silence a suspect of dubious probity might very well outweigh the desire to conduct a constitutionally valid interrogation. We have concluded that to introduce such a rule could undo much of the recent progress that has been made in upgrading police methods to preserve the rights guaranteed under the Fifth and Sixth Amendments, and would be inconsistent with the trend of our recent decisions.

We are also unable to follow the "middle ground" suggested in *Tate v. United States*, supra, to the effect

that if a defendant merely takes the stand and denies his part in the crime he may not be impeached by the fruits of unconstitutional interrogation, but if he testifies about collateral matters he may be so impeached. Such a rule would be virtually unworkable. The usual reason a defendant chooses to take the stand is to give the jury a comprehensive statement of his side of the story. Any story that would be responsive to the questions raised by the state's case would tend to open up collateral matters and would invite impeachment if the tools of impeachment were at hand. The state should be free to impeach, but it ought to come by its impeachment as legally as it accumulates its other evidence.

If the choice is to exclude all illegally obtained evidence or to silence the defendant as a witness, it is better to exclude the illegal evidence. As we have said before, circumvention of constitutional liberties is not to be encouraged by permitting illegally obtained evidence to come in "through the back door." *State of Oregon v. Goodwin*, 207 Or 642, 645, 298 P2d 1024 (1956).

Other assignments of error have been briefed and argued, but since they present questions that are not likely to arise upon another trial they need not be discussed at this time.

The case is reversed and remanded to the trial court for a new trial.

PERRY, J., dissenting.

I am of the opinion that neither *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L ed 2d 694, nor any of the

opinions of this court, compel the reasoning or result approved by the majority in this case.

Miranda v. Arizona, supra, and *State v. Neely*, 239 Or 487, 395 P2d 557, 398 P2d 482, deal with the use of confessons for the purpose of providing probative facts required to establish the necessary elements of the crime with which a defendant is charged. These cases are thus grounded upon the proposition set forth in the Fifth Amendment of the Constitution of the United States—that no man shall be compelled to give incriminating evidence against himself.

Incriminating evidence is evidence which tends to show that the defendant did certain acts from which a trier of fact could conclude that the defendant committed the crime charged. The purpose of the prophylactic rule of exclusion then is to prevent the introduction of statements made by a defendant which tend to establish his guilty acts as matters of fact.

The introduction of statements made by a defendant by way of impeachment to test the credibility of his story of his innocence serves no such purpose.

A defendant's statements and his confession thus used have no probative value to prove the crime charged, and the trial court will so instruct the jury.

The trial judge, after an extensive hearing, held that the confession of this defendant was voluntary, but that it could not be used as probative evidence because it violated the absolutism rules of procedure laid down by a majority of the Supreme Court of the United States

to curb what they believed were unwarranted police practices.

State v. Smith, 242 Or 223, 408 P2d 942, permits the introduction of statements for impeachment purposes if found voluntary.

In *Walder v. United States*, 347 US 62, 65, 74 S Ct 354, 98 L ed 503 (1954), in dealing with an exclusionary rule that prevented the introduction of evidence as proof of the crime charged, the Supreme Court stated:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide him with a shield against contradiction of his untruths. * * *"

I know of no reason why this court should go beyond the requirements of the Supreme Court of the United States in announcing a rule that would enlarge the exclusionary rules of the Supreme Court to a point not compatible with the purposes sought to be served by the Fifth Amendment.

Based upon the rationale of *Walder v. US*, supra, followed in *Tate v. US*, 283 F2d 377 (DC Cir 1960), and *State v. McClung*, 66 Wash2d 654, 404 P2d 460 (1965), I would affirm the judgment.

HOLMAN, J.,dissenting.

The issue is whether the prophylactic purposes of *Escobedo*[1] and *Neely*[2] will be negated if admissions and confessions obtained by non-compliance with those cases are permitted to be used for impeachment of de-

fendants. I am of the opinion that the inability of the prosecution to use such admissions and confessions in its case in chief for incriminating purposes will be sufficient to obtain compliance with *Escobedo* and *Neely* requirements by the police. If this is so there is no valid reason for not permitting the use for impeachment purposes of evidence that everyone concedes is both relevant and truthful.

O'Connell, J., joins in this dissent.

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① Escobedo v. State of Illinois, 378 US 478, 84S Ct 1758, 12 L ed2d 977 (1964).

② State v. Neely, 239 Or 487, 395 P2d 557, 398 P2d 482 (1965).